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No. 01-1247

In the Supreme Court of the United States

STATE OF WISCONSIN, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Sokaogon Chippewa Community of the Mole Lake Band of Chippewa Indians may administer a water quality standards program for surface waters within its reservation pursuant to Section 1377(e) of the Clean Water Act, 33 U.S.C. 1377(e), notwithstanding Wisconsin's claim that it holds title to the beds of some of those waters under the Equal Footing Doctrine.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	22

TABLE OF AUTHORITIES

Cases:

Alaska v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998)	4
Arkansas v. *Oklahoma*, 503 U.S. 91 (1992)	2, 4, 9
Atkinson Trading Co. v. *Shirley*, 532 U.S. 645 (2001)	16
Brendale v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989)	7, 18
California v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)	4
City of Albuquerque v. *Browner*, 97 F.3d 415 (10th Cir. 1996), cert. denied, 522 U.S. 965 (1997)	9, 11, 20
EPA v. *California*, 426 U.S. 200 (1976)	3
Lower Brule Sioux Tribe v. *South Dakota*, 104 F.3d 1017 (8th Cir.), cert. denied, 522 U.S. 816 (1997)	21
Montana v. *EPA*, 137 F.3d 1135 (9th Cir.), cert. denied, 525 U.S. 921 (1998)	11, 20
Montana v. *United States*, 450 U.S. 544 (1981)	7, 17, 18, 19, 20, 21
Nevada v. *Hicks*, 533 U.S. 353 (2001)	20
Strate v. *A-1 Contractors*, 520 U.S. 438 (1997)	19, 21
United States v. *Holt State Bank*, 270 U.S. 49 (1926)	15
United States v. *Wheeler*, 435 U.S. 313 (1978)	15
Wisconsin v. *Baker*, 698 F.2d 1323 (7th Cir.), cert. denied, 463 U.S. 1207 (1983)	18-19

Statutes and regulations: Page

Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 8
Clean Water Act, 33 U.S.C. 1251 *et seq.* 2
33 U.S.C. 1251(a) 2
33 U.S.C. 1251(b) 2
33 U.S.C. 1311 3
33 U.S.C. 1313 4
33 U.S.C. 1313(c) 3
33 U.S.C. 1313(c)(2)(A) 3
33 U.S.C. 1313(c)(3) 3
33 U.S.C. 1313(c)(4)(A) 3
33 U.S.C. 1342 3
33 U.S.C. 1342(a)(1) 4
33 U.S.C. 1370 2
33 U.S.C. 1377 ..... 5, 11, 16
33 U.S.C. 1377(e) ..... *passim*
33 U.S.C. 1377(e)(1) 6
33 U.S.C. 1377(e)(2) 6, 7, 15
33 U.S.C. 1377(e)(3) 6
33 U.S.C. 1377(h) 6
33 U.S.C. 1377(h)(1) 5
Water Quality Act of 1987, Pub. L. No. 100-4, § 506, 101 Stat. 76 4
18 U.S.C. 1151(a) 5
40 C.F.R.:
Section 122.4(d) 4
Section 131.3(k) 6
Section 131.3(*l*) 6
Section 131.8 ..... 2, 5
Section 131.8(a) 5
Section 131.8(a)(1) 5
Section 131.8(a)(2) 6
Section 131.8(a)(3) 6
Section 131.8(a)(4) 6
Section 131.8(b) 6
Section 131.8(c) 6

Regulations—Continued: Page

Section 131.8(c)(2)(ii) 6
Section 131.8(c)(3) 6
Section 131.8(c)(4) 6

Miscellaneous:

56 Fed. Reg. 64,876 (1991) 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 266 F.3d 741. The opinion of the district court (Pet. App. 15a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2001. A petition for rehearing was denied on November 28, 2001 (Pet. App. 48a-49a). The petition for a writ of certiorari was filed on February 25, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Congress has authorized the Environmental Protection Agency (EPA) to treat Indian Tribes in the same manner as States for certain purposes of the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, and has directed EPA to promulgate regulations "which specify how Indian tribes shall be treated as States" for those purposes. 33 U.S.C. 1377(e). See Pet. App. 86a-87a. Following notice and comment, EPA promulgated regulations that provide a mechanism for Tribes to receive "treatment as a state" (TAS) status. See 40 C.F.R. 131.8 (Pet. App. 89a-92a). The Sokaogon Chippewa Community of the Mole Lake Band of Chippewa Indians (the Band) applied for and received TAS status under those regulations. *Id.* at 37a-38a. Petitioner, the State of Wisconsin, brought this action in the United States District Court for the Eastern District of Wisconsin challenging EPA's grant of TAS status to the Band as unlawful. The district court rejected petitioner's assertions that EPA's decision is invalid as a matter of law, *id.* at 15a-34a, and the court of appeals affirmed, *id.* at 1a-14a.

1. The CWA is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the reduction and eventual elimination of the discharge of pollutants into those waters. 33 U.S.C. 1251(a). To achieve those goals, the CWA establishes a partnership between the federal government and the States in which the States have "primary responsibilities and rights" to regulate water pollution. 33 U.S.C. 1251(b); see 33 U.S.C. 1370; *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992). Congress has also extended that partnership to Indian Tribes by providing, through Section

1377(e) of the CWA, that Indian Tribes satisfying prescribed criteria are eligible for treatment in the same manner as States for certain purposes under the CWA. See 33 U.S.C. 1377(e).

As part of its regulatory program, the CWA provides that each State must adopt water quality standards for all waters within the State's jurisdiction and submit those standards to EPA for approval. 33 U.S.C. 1313(c). States must specify one or more designated "uses" of each waterway (*e.g.*, public water supply, recreation, fish propagation, or agriculture) and must establish water quality criteria to protect those uses. 33 U.S.C. 1313(c)(2)(A). EPA reviews all new or revised state water quality standards for consistency with the requirements of the Act. 33 U.S.C. 1313(c)(3). If EPA determines that a state standard does not meet minimum federal requirements, then EPA disapproves the standard. The State may then adopt changes suggested by EPA, or failing such action, EPA must itself issue a water quality standard for the State. 33 U.S.C. 1313(c)(3) and (4)(A).[1]

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[1] In addition to water-quality-based requirements, the CWA also provides for technology-based requirements, which take into account the capability of existing pollution-control technologies to remove particular pollutants from effluents. EPA or the State may establish effluent limitations, reflecting technology-based requirements for discrete categories and classes of point sources, that restrict the quantities, rates, and concentrations of specified pollutants that may be discharged into water from the point sources. See 33 U.S.C. 1311, 1342. Both water quality-based and technology-based requirements are implemented for point sources through a permit process, known as the National Pollutant Discharge Elimination System (NPDES). The Act prohibits "the discharge of any pollutant" into the Nation's waters except as authorized by an NPDES permit. 33 U.S.C. 1311, 1342; see *EPA* v. *California*, 426 U.S. 200, 205 (1976). All NPDES permits must

Federal law generally prohibits States from exercising regulatory authority within Indian reservations unless Congress has authorized such action. See *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216 & n.18 (1987); see also *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998) ("Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States."). As originally enacted, the CWA did not specifically identify any non-federal governmental entity that had authority to set standards for waters within Indian reservations. Congress amended the CWA in 1987 to provide that EPA may treat qualifying Indian Tribes in the same manner as States for the purposes of, inter alia, setting water quality standards for surface waters within the exterior boundaries of their reservations. 33 U.S.C. 1377(e); see Water Quality Act of 1987, Pub. L. No. 100-4, § 506, 101 Stat. 76. Section 1377(e) states that EPA is authorized to "treat an Indian tribe as a State" for the purposes of 33 U.S.C. 1313 if:

> (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
>
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe,

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include effluent limitations that require the permittee's adherence to technology-based standards and, where applicable, more stringent water quality-based limitations designed to ensure that the receiving waters attain and maintain state water quality standards. See 33 U.S.C. 1342(a)(1); 40 C.F.R. 122.4(d); *Arkansas*, 503 U.S. at 104-107.

> held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and
>
> (3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

33 U.S.C. 1377(e). The term "Federal Indian reservation" is defined for those purposes to mean "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." 33 U.S.C. 1377(h)(1); cf. 18 U.S.C. 1151(a). Section 1377(e) directs EPA to promulgate regulations "which specify how Indian tribes shall be treated as States for purposes of this chapter" and to provide a mechanism for resolving disputes between States and Indian Tribes located on common bodies of water. 33 U.S.C. 1377(e).

2. In accordance with Section 1377(e)'s directions, EPA has promulgated regulations for the treatment of Indian Tribes in the same manner as States. See 40 C.F.R. 131.8 (Pet. App. 89a-92a). EPA's regulations set out four criteria, embodying the statutory requirements of Section 1377, that an applicant must meet to receive TAS status. See 40 C.F.R. 131.8(a); Pet. App. 89a.

First, the applicant must be a federally recognized Indian Tribe that exercises governmental authority over a federal Indian reservation. 40 C.F.R. 131.8(a)(1),

131.3(k) and (*l*); see 33 U.S.C. 1377(e)(1) and (h). Second, the Indian Tribe must have a governing body that carries out "substantial governmental duties and powers." 40 C.F.R. 131.8(a)(2); see 33 U.S.C. 1377(e)(1). Third, the water quality standards program that the Indian Tribe seeks to administer must pertain to the management and protection of water resources that are within the borders of the Indian reservation. 40 C.F.R. 131.8(a)(3); see 33 U.S.C. 1377(e)(2). Fourth, the Indian Tribe must reasonably be expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Clean Water Act and the relevant regulations. 40 C.F.R. 131.8(a)(4); see 33 U.S.C. 1377(e)(3).

EPA's regulations also set out the procedural requirements that Indian Tribes must follow to apply for and obtain TAS status. 40 C.F.R. 131.8(b) and (c); Pet. App. 89a-92a. The Tribe must submit a detailed application to the appropriate EPA Regional Administrator demonstrating that the Tribe satisfies the prescribed criteria for TAS status. 40 C.F.R. 131.8(b). The Regional Administrator provides notice of a Tribe's application to all appropriate governmental entities and allows 30 days for the submission of comments on the Tribe's assertion of authority. 40 C.F.R. 131.8(c)(2)(ii) and (c)(3). The Regional Administrator then determines, based on the Tribe's application, comments received, and other relevant information, whether the Tribe "has adequately demonstrated that it meets the requirements" for treatment in the same manner as a State. 40 C.F.R. 131.8(c)(4).

Section 1377(e)(2) allows Tribes to implement portions of the CWA when "the functions to be exercised by the Indian Tribe pertain to the management and

protection of water resources * * * within the borders of an Indian reservation." 33 U.S.C. 1377(e)(2). EPA has made a judgment to look to this Court's precedents respecting inherent tribal authority for guidance on how to implement the statutory TAS program and to address non-Indian interests, including the interests of non-Indians who own fee lands within a reservation. EPA observed, in the preamble to its regulations, 56 Fed. Reg. 64,876 (1991), that an Indian Tribe may have "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Pet. App. 95a (quoting *Montana* v. *United States*, 450 U.S. 544, 566 (1981)). EPA therefore decided that, in implementing Section 1377(e) in situations where non-members would be affected, the agency would take account of the Tribe's authority in light of the evolving case law as reflected in *Montana* and *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Pet. App. 96a.

Rather than establishing a bright-line rule, EPA stated that "the ultimate decision regarding Tribal authority [over non-members] must be made on a Tribe-by-Tribe basis," Pet. App. 95a, and the "extent of such tribal authority depends on the effect of th[e] activity on the tribe," *id.* at 96a. EPA determined that it would proceed on the premise (which EPA termed an "interim operating rule") that the Tribe should be required to show in all cases that the "potential impacts of regulated activities on the tribe are serious and substantial." *Id.* at 97a. But EPA also observed that "the activities regulated under the various environmental statutes generally have serious and substantial impacts

on human health and welfare." *Ibid.* It ultimately concluded that "[t]he determination as to whether the required effect is present in a particular case depends on the circumstances." *Ibid.*

3. The Band applied to EPA for TAS status for the purpose of developing water quality standards for all surface waters within the boundaries of the Mole Lake Reservation (the Reservation) in northeastern Wisconsin. Pet. App. 50a. Although a Tribe may also seek authorization to administer an NPDES permit program within its reservation, see note 1, *supra*, the Band did not request that additional authority. In accordance with EPA's regulations, petitioner was provided with an opportunity to comment on the Band's application. Petitioner disputed the Band's authority to set water quality standards within the Reservation on the basis of petitioner's claim that it held title to the beds of the lakes within the Reservation. *Id.* at 69a. EPA considered the materials submitted by both the Band and petitioner. It determined that the waters in question are within the Reservation, *id.* at 52a, and that the Band has authority under EPA's regulations to develop water quality standards for all surface waters within the Reservation's boundaries, *id.* at 39a-47a, 52a-53a.

4. Petitioner filed suit under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, challenging EPA's decision to grant the Band TAS status to establish water quality standards under the CWA. Pet. App. 22a. Petitioner claimed that it held title to the beds of navigable lakes within the Reservation under the Equal Footing Doctrine and that the Band, therefore, could not set water quality standards for those waters. *Id.* at 21a. The district court granted summary judgment for EPA and the Band, concluding that EPA's decision is reasonable and consistent with

the CWA and EPA's implementing regulations. *Id.* at 32a.

5. A unanimous court of appeals panel affirmed. Pet. App. 1a-14a. The court noted at the outset that two factors are highly pertinent to the Tribe's interest in assuming responsibility for water quality standards within the Reservation: "First, the Band is heavily reliant on the availability of the water resources within the reservation for food, fresh water, medicines, and raw materials. * * * Second, all of the 1,850 acres within the reservation are held in trust by the United States for the tribe." *Id.* at 4a-5a.

Like the district court, the court of appeals rejected petitioner's argument that, because it claimed to hold title to the beds of navigable lakes under the Equal Footing Doctrine, the Band is not entitled to specify water quality standards for those lakes. Pet. App. 7a-10a. The court of appeals reasoned that, assuming arguendo that petitioner does have title to the lake beds, *id.* at 7a-8a, the Tribe's issuance of water quality standards for the lakes is consistent with petitioner's ownership of the land beneath the water, *id.* at 8a-10a.

The court of appeals acknowledged that the Band's establishment of water quality standards for surface waters within its Reservation could conceivably affect activities outside of the Reservation. Pet. App. 10a.[2] The court noted, however, that Congress had provided for that possibility by directing EPA to create "a

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[2] Most significantly, NPDES permits issued to a discharger in an upstream State may need to include limitations if necessary to meet the applicable downstream water quality standards. *Arkansas* v. *Oklahoma*, 503 U.S. at 107; see *Wisconsin* v. *EPA*, No. 96-C-597 (E.D. Wis. filed May 21, 1996); Pet. App. 11a (citing *City of Albuquerque* v. *Browner*, 97 F.3d 415 (10th Cir. 1996), cert. denied, 522 U.S. 965 (1997).

mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water" (33 U.S.C. 1377(e)). Pet. App. 10-13a. The court noted that, in any event, petitioner "exaggerates" the possibility of such speculative conflicts. See *id.* at 13a. The court of appeals concluded that EPA's grant to the Band of authority to issue water quality standards for surface waters fully within the Reservation's boundaries is reasonable on the facts of this case and not otherwise contrary to law. *Id.* at 14a.

ARGUMENT

The court of appeals correctly concluded that EPA acted within its authority under 33 U.S.C. 1377(e) of the Clean Water Act in authorizing the Mole Lake Band to set water quality standards for surface waters wholly within its reservation and wholly surrounded by tribal lands. That fact-specific decision does not conflict with any decision of this Court or any other court of appeals, and it does not raise any issue of exceptional importance warranting this Court's review.

1. This Court normally does not review a court of appeals' decision affirming a federal agency's application of a federal statute to particular factual circumstances in the absence of a square conflict among the courts of appeals on the meaning of the statute. Petitioner does not contend that this case presents such a conflict. To the contrary, the two other courts of appeals that have considered EPA grants of TAS status to Tribes to set water quality standards for their reservations have similarly sustained EPA's exercise of its authority under Section 1377(e).

In *City of Albuquerque* v. *Browner*, 97 F.3d 415, 419, 425-426 (1996), cert. denied, 522 U.S. 965 (1997), the Tenth Circuit upheld EPA's regulations and its approval of the Pueblo of Isleta's water quality standards. The court ruled that EPA had properly incorporated those standards into an NPDES permit issued to the City's waste treatment facility, which discharged into the Rio Grande at a point above the reservation. See *id.* at 425-426. The court concluded that EPA's authorization of the Pueblo to establish water quality standards for purposes of the CWA "is in accord with powers inherent in Indian tribal sovereignty." *Id.* at 423.

In *Montana* v. *EPA*, 137 F.3d 1135, cert. denied, 525 U.S. 921 (1998), the Ninth Circuit upheld EPA's grant of TAS status to the Confederated Salish and Kootenai Tribes to establish water quality standards throughout the Flathead Reservation. The court "affirm[ed] the district court's decision that EPA's regulations pursuant to which the Tribe's TAS authority was granted are valid as reflecting appropriate delineation and application of inherent Tribal regulatory authority over non-consenting non-members." *Id.* at 1141.

The court of appeals' decision in this case is consistent with *Albuquerque* and *Montana*. Like the Ninth and Tenth Circuits, the court of appeals concluded that EPA acted within its authority and discretion by granting TAS status to a particular Indian Tribe based on a "fact-specific" analysis of the factors identified in Section 1377 of the CWA and EPA's implementing regulations. Pet. App. 14a. Because the three courts of appeals that have addressed EPA's application of Section 1377(e) have spoken harmoniously, there is no occasion for this Court to intercede.

As in *Albuquerque* and *Montana*, this Court should deny the petition for writ of certiorari.[3]

2. Petitioner asserts (Pet. 11-15) that, notwithstanding the absence of a conflict among the courts of appeals, the issues raised in this case are of exceptional importance warranting this Court's review. Petitioner specifically contends (Pet. 14-15):

> Unless EPA's policy is corrected, large numbers of nonmembers of [Indian tribes] in this country may find, to their considerable surprise, that they have become subject, either directly or indirectly, to the authority of tribal governments in which they have no rights to participate and which may provide limited opportunity for fair review of adverse tribal decisions. This is particularly true on reservations, like some in Wisconsin, populated by large numbers of nonmembers.

Petitioner further asserts (Pet. 15) that the instant case provides "a good vehicle for addressing the limits of tribal sovereignty over nontribal resources and persons."

Petitioner is mistaken as to the practical effect of this decision and its suitability as a "vehicle" for addressing the issues that petitioner contends are "fundamentally important" (Pet. 15). This case involves a fact-specific

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[3] Petitioner mistakenly suggests (Pet. 13) that in this case, unlike *Montana*, the court of appeals deferred "to EPA's legal analysis of Indian law precedent." Rather, the court of appeals stated that EPA's "regulations and subsequent decision" were entitled to deference. Pet. App. 6a. The court of appeals did not defer to EPA's interpretation of case law, nor did the government suggest that the court should do so. See Gov't C.A. Br. 14 n.8 ("EPA, of course, agrees with Wisconsin (Br. 15) that the Agency's interpretation of case law is reviewed by this Court *de novo*.").

application of Section 1377(e) to one relatively small Indian reservation. Moreover, as the court of appeals' decision points out, the Mole Lake Reservation is "unusual" in that "[n]one of the land within the reservation is controlled or owned in fee by non-members of the tribe." Pet. App. 4a-5a. Unlike *Montana* v. *EPA*, in which the Court denied review, the issue of tribal regulation of nonmembers living within the boundaries of an Indian reservation is wholly absent from this case. Furthermore, it is currently unclear what, if any, effects the Band's water quality standards will have on activities outside the Reservation. See *id.* at 13a ("granting TAS status to tribes simply allows the tribes some say regarding [water quality] standards and permits"). Hence, this case is a particularly poor vehicle for assessment by this Court of the effects of a Tribe's TAS status on non-Indians.[4]

Petitioner's suggestion (Pet. 12-13) that this decision will inevitably lead to tribal regulation of waterways throughout Wisconsin vastly exaggerates the impact of this case. The Band's reservation encompasses a mere 1850 acres, all of which are held by the United States in trust for the Band. EPA granted TAS status based on an individualized assessment of the Band's circumstances, Pet. App. 37a-47a, in accordance with the agency's view that "the ultimate decision regarding Tribal authority must be made on a Tribe-by-Tribe basis," *id.* at 95a. As the court of appeals correctly

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[4] Petitioner has filed a separate suit specifically challenging the Band's water quality standards, which would be more likely to encounter such questions. See *Wisconsin* v. *EPA*, No. 96-C-597 (E.D. Wis. filed May 21, 1996). On June 17, 1999, the district court administratively closed that case, subject to reopening within 90 days after the outcome of the appeal in this case. See *id.*, Docket Sheet Entry No. 26 (June 18, 1999).

observed (*id.* at 14a), EPA's grant of TAS status to the Mole Lake Band is justified by the Band's substantial reliance on the Reservation's water resources and the complete absence of "fee land within the reservation owned by non-members of the tribe." Because EPA's determination here was "fact specific," the court of appeals left for "another day" how far a tribe's authority might extend "on a different set of facts." *Ibid.* The court of appeals' explicitly limited rationale and the record here therefore contradict petitioner's claim (Pet. 12) that "[i]f the decision below is allowed to stand, Wisconsin will lose much of [its] authority with respect to hundreds of navigable waterways."[5]

3. The court of appeals correctly rejected petitioner's novel claim (Pet. 15-22) that tribal TAS status pursuant to a federal statute regulating water quality is incompatible with a State's ownership of lands underlying navigable waters pursuant to the Equal Footing Doctrine. Like EPA and the district court, the court of appeals assumed, arguendo, that petitioner owns lands underlying some of the surface waters within the Reservation, but it nevertheless decided that such

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[5] Petitioner also overstates the national significance of the TAS program. Petitioner contends (Pet. 13) that "over 210 tribes nation-wide have received TAS status *under various provisions* of the Clean Water and Safe Drinking Water Acts" (emphasis added). This case, however, involves TAS status to establish water quality standards, and not TAS status for other programs. EPA informs us that, out of a total of 49 applications for TAS authority to establish water quality standards over the past decade, EPA has approved 23. As noted above, those approvals have generated only three court of appeals decisions since the issuance of EPA's regulations in 1991.

ownership would not affect the Tribe's qualifications for TAS status. Pet. App. 7a-10a.[6]

As the court of appeals recognized, petitioner's reliance on its asserted title is misplaced because Congress did not condition a Tribe's entitlement to TAS status on that criterion. Pet. App. 8a-10a. Congress, which "has plenary authority to legislate for the Indian tribes in all matters," *United States* v. *Wheeler*, 435 U.S. 313, 319 (1978)), set out the relevant standards for TAS status in Section 1377(e). It provided that Indian Tribes may qualify for TAS status for certain CWA purposes, not only with respect to water resources that are held by or on behalf of the Tribe or its members, but also with respect to water resources that are "otherwise within the borders of [the] Indian reservation." 33 U.S.C. 1377(e)(2). Congress, which indisputably has authority to empower the EPA to set water quality standards for navigable waters without regard to who owns the underlying submerged lands, directed EPA to allow qualifying Indian Tribes to make those determinations (within the parameters of the federal statutory Clean Water Act program) for all

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[6] For the purposes of the Equal Footing Doctrine, navigable waters are those that were navigable in fact at statehood. *United States* v. *Holt State Bank*, 270 U.S. 49, 56 (1926). Navigable streams or lakes are those on "which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Ibid.* Contrary to petitioner's contention (Pet. 19), EPA has not conceded that petitioner owns the beds of the navigable waters of the Reservation. Pet. App. 44a, 52a. The determination of navigability requires a fact-intensive inquiry for each water body. There is no evidence in the record of this case, one way or the other, on the questions of what water bodies were navigable in fact at the time of Wisconsin's statehood in 1848 and what property interest petitioner has retained in the beds under those water bodies.

waters within the exterior boundaries of their reservations. As the court of appeals correctly observed, "[b]ecause [petitioner] does not contend that its ownership of the beds would preclude the federal government from regulating the waters within the reservation, it cannot now complain about the federal government allowing tribes to do so." Pet. App. 9a-10a.[7]

Congress's direction that EPA may grant a qualifying Tribe TAS status with respect to all waters within the borders of a reservation is particularly appropriate in this case, because the Reservation contains no lands owned in fee by non-members of the Tribe. Rather, the Reservation uplands indisputably consist entirely of lands owned wholly by the United States in trust for the Band, which has regulatory authority over all of its members. Cf., *e.g.*, *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645 (2001) (Navajo Nation does not have inherent power to tax non-Indian on non-Indian fee land on Reservation). EPA properly concluded, in light of those facts, that the Band "necessarily possess[es] authority over all persons on Reservation lands who may be engaging in activities that may affect the quality" of the Reservation's waters. Pet. App. 45a. Thus, EPA concluded that, even if the State holds title to certain submerged lands, the Band's authority is nonetheless sufficient to "adequately regulate virtually all activities which might affect the quality of Reservation waters." *Ibid.* Under those circumstances, the

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[7] Significantly, neither Section 1377 of the CWA nor its legislative history mentions the Equal Footing Doctrine or submerged lands. Furthermore, the court of appeals found that petitioner has waived any claim that Rice Lake and other water bodies are somehow not "within the borders" of the Reservation. Pet. App. 7a.

court of appeals held that it was "reasonable for the EPA to determine that ownership of the waterbeds did not preclude federally approved regulation of the quality of the water." *Id.* at 10a. Petitioner has made no showing that those fact-specific findings are erroneous.

Contrary to petitioner's assertions (Pet. 19), the court of appeals' decision does not conflict with this Court's decision in *Montana* v. *United States*, 450 U.S. 544 (1981). Petitioner essentially argues that *Montana* stands for the proposition that, if a State holds title to submerged lands, then a Tribe may never exercise any regulatory authority respecting the overlying waters. But *Montana* contains no such holding. In that case, this Court determined that the State owned the bed of the Big Horn River. See *id.* at 556-557. It nevertheless did not find the State's ownership dispositive of the Tribe's authority to regulate non-member fishing and sport hunting in and on those waters. Compare *id.* at 550-551 n.1, with *id.* at 557-567. Petitioner's understanding of *Montana* and its consequent assertion that this case conflicts with *Montana* are accordingly wrong.

The Court stated in *Montana* that, as a general rule, Tribes lack inherent authority to regulate the conduct of non-members on non-Indian lands within reservations. 450 U.S. at 557-567. But the Court recognized that the general rule is subject to important exceptions. In particular, the Court stated:

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 566. See, *e.g.*, *Brendale*, *supra*. EPA has taken guidance from *Montana* in determining whether a Tribe is entitled to TAS status under Section 1377(e) of the CWA. It has elected to "evaluat[e] whether a tribe has authority to regulate a particular activity on land owned in fee by nonmembers but located within a reservation" by reference to "the evolving case law as reflected in *Montana* and *Brendale*." Pet. App. 96a. EPA conducted that evaluation in this case and found that, because the Band depends on the water resources at issue for its livelihood and cultural integrity, and because the Band's reservation contains no non-member fee lands, granting the Band authority to determine water quality standards for those waters is consistent with *Montana*. *Id* at 45a-47a. Hence, EPA's grant of TAS status to the Band pursuant to Section 1377(e) is fully compatible with *Montana*.

As the court of appeals correctly recognized, the Band's entitlement to TAS status ultimately depends on the authority that Congress made available to Indian Tribes through Section 1377(e). Unlike *Montana*, this case does not arise out of a Tribe's bare assertion of inherent authority, but under the specific provisions of the CWA, which establishes a complex regulatory scheme and charges an expert agency with responsibility to coordinate the activities of the federal government, the States, and Indian Tribes. See 33 U.S.C. 1377(e). Section 1377(e) and EPA's implementing regulations allow eligible Tribes to play a role with respect to all water resources within their reservations and do not draw the distinction that petitioner urges.[8]

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[8] Petitioner relied heavily below (Pet. App. 8a, 30a-31a) on the court of appeals' decision in *Wisconsin* v. *Baker*, 698 F.2d 1323,

4. Petitioner also contends (Pet. 22-25) that EPA has misinterpreted this Court's post-*Montana* precedents. There is no merit to that contention. Petitioner primarily asserts (Pet. 24) that this Court's decision in *Strate* v. *A-1 Contractors*, 520 U.S. 438 (1997), narrowed the *Montana* exception such that EPA cannot rely on the Band's interest in the "health and safety" of its members in granting TAS status. That is not so. In *Strate*, this Court held that a Tribe's inherent sovereignty did not extend so far as to create a tribal court forum for a "commonplace state highway accident claim." 520 U.S. at 459. The Court did not, however, narrow the *Montana* exception. To the contrary, *Strate* identified *Montana* as the "pathmarking case concerning tribal civil authority over nonmembers" and reaffirmed the *Montana* test verbatim. *Id.* at 445; see

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1335 (7th Cir.), cert. denied, 463 U.S. 1207 (1983), but the court correctly recognized that the *Baker* decision is inapposite. The court of appeals ruled in *Baker* that a Wisconsin Tribe was not entitled to regulate non-member hunting and fishing on lakes within its reservation because the State held title to the lake beds. The court nevertheless left open the possibility of tribal regulation, even when the State owned the lake beds, where necessary to protect the "'political integrity, the economic security, or the health or welfare' of the Band." *Id.* at 1335 (quoting *Montana*, 450 U.S. at 566). As the court of appeals below recognized, limitations on tribal regulation of hunting and fishing on non-tribal lands within a reservation are of little or no relevance here where the issue is tribal authority to set water quality standards pursuant to the CWA. See Pet. App. 8a-9a. Hunting and fishing rights "have traditionally been the subject of state regulation," *id.* at 8a, while "the ultimate authority for the water quality standards lies with the federal EPA, not the state of Wisconsin (which itself has acted only pursuant to federal delegation)." *Ibid.*

Nevada v. *Hicks*, 533 U.S. 353, 358 (2001) (quoting *Strate*).[9]

Here, the record shows that water quality is particularly important to the Band since the Band "is heavily reliant on the availability of the water resources within the reservation for food, fresh water, medicines, and raw materials." Pet. App. 4a. The court of appeals based its decision, in part, on the Band's "unusual" reliance on water resources, *ibid.*, and left "for another day" the question as to how far tribal authority might extend on a different set of facts. *Id.* at 14a. In light of EPA's Tribe-by-Tribe approach, petitioner cannot credibly claim (Pet. 23) that a finding of tribal regulatory jurisdiction is necessarily "guarantee[d]" in every instance. To the contrary, the court of appeals' analysis was based on the facts in the record before it, which show that EPA correctly found that impairment of water quality would have a serious and substantial effect on the health and welfare of the Band because its "water resources are essential to its survival." Pet. App. 13a.

Petitioner also errs (Pet. 24-25) in asserting that tribal authority may be invoked only where the record reflects "a real" threat to the Tribe arising from wholly inadequate federal and state oversight. In support of that contention, petitioner again primarily relies on

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[9] Moreover, the effects of water pollution are far more threatening to a Tribe than isolated traffic accidents. As the court of appeals in *Montana* v. *EPA* explained, "the conduct of users of a small stretch of highway has no potential to affect the health and welfare of a tribe in any way approaching the threat inherent in impairment of the quality of the principal water source." 137 F.3d at 1141. See *Albuquerque*, 97 F.3d at 423 (observing that the authority to establish water quality standards "is in accord with powers inherent in Indian tribal sovereignty").

Montana and *Strate*. But that is not what those decisions say. This Court determined in *Montana* that a Tribe lacks inherent authority to regulate non-member activity unless such activity threatens the Tribe's political integrity, economic security, or the "subsistence or welfare of the Tribe." 450 U.S. at 566. The Court noted that, in some circumstances, the State's failure to manage nonmember activities may itself create a threat to the Tribe's political integrity, economic security, or health or welfare that would warrant a Tribe's taking regulatory action. *Id.* at 566 n.16.[10] See *Lower Brule Sioux Tribe* v. *South Dakota*, 104 F.3d 1017, 1023 (8th Cir.), cert. denied, 522 U.S. 816 (1997). It did not, however, limit tribal regulatory authority to circumstances in which State or federal regulation was wholly inadequate.[11]

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[10] This Court stated:

> Similarly, the complaint did not allege that the State has abdicated or abused its responsibility for protecting and managing wildlife, has established its season, bag, or creel limits in such a way as to impair the [Tribe's] treaty rights to fish or hunt, or has imposed less stringent hunting and fishing regulations within the reservation than in other parts of the State.

450 U.S. at 566 n.16.

[11] Likewise, this Court's decision in *Strate* supports no such requirement. As discussed above, *Strate* held that a tribal court lacked jurisdiction over a tort case arising from a traffic accident between non-members on a portion of state highway crossing an Indian reservation. This Court concluded that the *Montana* test was not satisfied because tribal jurisdiction over an accident involving only non-members was not "crucial to the 'political integrity, the economic security, or the health or welfare of the [Tribe]'" and was not necessary to protect tribal self-government. 520 U.S. at 459. The Court noted that a state judicial forum was available to resolve the dispute, but it did not suggest that tribal

In short, this case does not involve a "dramatic expansion" (Pet. 25) of this Court's recognition in *Montana* that Tribes retain some aspects of inherent sovereignty. Rather, this case simply involves EPA's application of Section 1377(e) of the CWA to a discrete factual situation in a manner consistent with the text of the statute, the agency's regulations, and the decisions of the only two other courts of appeals that have had occasion to interpret that statutory provision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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jurisdiction over non-members exists only in the absence of an alternative forum.